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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 525

RUTH K. ARMSTRONG,

Petitioner,

vs.

LEE R. ARMSTRONG

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ruth K. Armstrong, respectfully petitions this Honorable Court for a writ of certiorari to the District Court of Appeal, Second Appellate District, Division One, State of California.

Summary and Short Statement of the Matter Involved

The only issue presented to this Court is whether petitioner has been deprived of her constitutional right to due process of law as guaranteed by the 14th Amendment to the United States Constitution by the State of California. Specifically,

the issue involves petitioner's right to reasonable notice of hearing of a motion by respondent to set aside a judgment of divorce theretofore rendered in favor of petitioner and to a hearing on the merits.

The action was one for divorce filed by petitioner against respondent in the Superior Court of the State of California, in and for the County of Los Angeles (R. 1-2). Respondent was personally served with a copy of the summons and complaint in Los Angeles County on July 12, 1945, and on July 26, 1945, his default was duly entered upon his failure to appear or answer (R. 2). On August 14, 1945, petitioner was awarded an interlocutory divorce, custody of two minor children, and certain property pursuant to a property settlement previously entered into by the parties (R. 4-7).

On January 24, 1946, two days prior to expiration of the six-months' jurisdictional period wherein the court had power by statute to set aside the judgment, respondent filed a notice of application to vacate and set aside the divorce judgment on the ground that judgment was rendered "through and by reason of the mistake, inadvertence, surprise or excusable neglect of said defendant" (respondent) (R. 11-20). On January 24, 1946, respondent obtained an *ex parte* order from a Judge of the Superior Court, without affidavit or other basis, shortening the time of service of notice of said application to one day (R. 12).

On January 25, 1946, at 9:20 A.M., a copy of the notice of application was served on petitioner's then attorney of record, Marlan A. Proctor, Esq., who was then absent from his office, by leaving the notice at his office in Burbank, California, with his secretary (R. 21). Petitioner's attorney received the notice upon returning to his office between 10:00 A. M. and noon, January 25 (R. 31). The same day, at 5:05 P.M. respondent served petitioner's attorney with a copy of his affidavit in support of his application (R. 21). On January 25, petitioner was in Earlimart, Tulare County,

California, approximately 150 miles from Los Angeles, the place of hearing of the application, and on that day petitioner was personally served with a copy of the notice of application but not with a copy of respondent's said supporting affidavit (R. 22).

On January 26, 1946, at 10:30 A.M., at Los Angeles, which was the time and place set for hearing of the application, respondent made application to the Superior Court to set aside the divorce judgment. Petitioner made a special appearance through her attorney to contest the court's jurisdiction to vacate and set aside the divorce judgment on the ground of insufficiency of the time of notice of hearing of said application and on the ground that certain statutes providing for the manner of service of notice had not been complied with. Petitioner presented no evidence or counter-affidavits on the merits of the application (R. 22-23, 36). The Superior Court vacated and set aside the divorce judgment at said hearing on January 26, 1946 (R. 22-23).

On February 7, 1946, petitioner served on respondent and filed a notice of motion to vacate and set aside the prior order vacating the divorce judgment on the ground that she had been taken by surprise and that neither she nor her counsel had had any opportunity to prepare for or present any defense on the merits to the respondent's prior application (R. 27-29). Petitioner's said motion was subsequently heard and denied, the only issue presented and the only arguments made having been as to the reasonableness and adequacy of the notice given by respondent of the prior hearing on respondent's application, and as to the court's power to vacate the order previously made, respondent's counsel contending that the court had no power, in any event, to vacate the prior order (R. 35-68). Petitioner appealed to the Supreme Court of California from both orders (R. 7-8). The appeal was transferred by order of the Supreme Court to the District Court of Appeal

for hearing and determination which latter court affirmed said orders of the Superior Court by its decision filed on August 22, 1947 (R. 69-74).

Petitioner filed a petition for rehearing in the District Court of Appeal and said petition was denied (R. 75). Petitioner thereafter filed a petition for hearing in the Supreme Court of California, which petition was denied by order dated October 20, 1947 (R. 75).

Jurisdictional Statement

(1)

Statutory Provision Sustaining Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, section 237(b), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 [Title 28 U. S. C. section 344(b)] on the ground that a final judgment has been rendered or passed by the highest court of a State in which a decision could be had where was drawn in question and where a right was specially set up or claimed by petitioner under the constitution and that right denied. More particularly, this Court has jurisdiction to review the orders herein involved under the statute above referred to in that an important and substantial Federal question is presented, *viz.*, whether petitioner was denied her right to due process of law under the Fourteenth Amendment to United States Constitution by the State courts by reason of the fact that the judgment of divorce in favor of petitioner was vacated and set aside on respondent's application, petitioner having been given notice of the hearing of said application but one day (less than twenty-four hours) before the hearing.

(2)

The Validity of a State Statute Is Not Involved

There is no issue presented as to the validity of any state statute. Under the provisions of the California Code of Civil Procedure, section 1005, an adverse party is entitled to at least five days' written notice of hearing of a motion or application, but said statute also provides that the court or a judge thereof may prescribe a shorter time (Appendix, page 16). While a judge of the Superior Court did make an *ex parte* order shortening time of notice to one day in this action (R. 12), it is petitioner's contention that the validity or constitutionality of said statute is not in issue but that it was the action of the judge in shortening time of notice to one day and the action of the Superior Court in proceeding to hear and determine the application without petitioner having had a reasonable time to consult counsel or to prepare for the hearing or to resist the application on its merits which violated petitioner's constitutional right, which right was set up and claimed by petitioner.

(3)

The Date of the Judgment

The date of the judgment of the District Court of Appeal, affirming the orders appealed from, was August 22, 1947 (R. 69). Petition for rehearing was denied by the District Court of Appeal on September 10, 1947 (R. 75). A timely petition for hearing by the California Supreme Court was filed by petitioner and denied by order made and filed on October 20, 1947 (R. 75).

Under California law, an order of the Supreme Court denying a petition for hearing in the Supreme Court after judgment in the District Court of Appeal makes such judg-

ment a final judgment by the highest court in the state in which decision could be had, and all remedies in the state courts have been exhausted. (California Constitution, Art. VI, Sec. 4, 4(c); Rule 28 (a) (e). Rules on Appeal. Appendix, pages 16-17). The judgment of the District Court of Appeal became final on October 20, 1947 within the meaning of the Judicial Code, Section 237(b) [Title 28 U. S. C., Section 344(b)]. The writ of certiorari should properly be addressed to the District Court of Appeal. The time limit for applying to this Court for relief commenced to run on October 20, 1947, at which date the California Supreme Court denied the petition for hearing. (*American Railway Express Co.* v. *Levee,* 263 U. S. 19; 68 L. Ed. 140).

(4)

Nature of Case and Rulings of Courts Below

The nature of the case and the rulings of the courts below are adequately set forth herein in the Summary and Short Statement of The Matter Involved, reference to which is hereby made.

The cases hereinafter cited under the heading "A Substantial Federal Question Is Involved" are believed to sustain jurisdiction in that such cases also show that a claim of denial of due process of law under the Fourteenth Amendment presents a Federal question conferring jurisdiction on this Court under Judicial Code, section 237(b) [U. S. C. section 344(b)].

(5)

A Substantial Federal Question Is Involved

The Federal question is substantial and is one which this Honorable Court should exercise its jurisdiction to review by writ of certiorari:

(a) In setting aside the divorce judgment without requiring that petitioner be given reasonable notice of the hearing, the Superior Court unconstitutionally exercised authority. (*Zucht* v. *King*, 260 U. S. 174; 67 L. Ed. 194).

(b) The Federal question presented requires analysis and exposition. (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U. S. 710; 67 L. Ed. 1194).

(c) In determining the issue of whether the divorce judgment should be set aside, the state court was bound to proceed in such manner that all of the substantial rights of the parties under the United States Constitution and Federal law would be protected. Whether it did so raises a Federal question reviewable under Sec. 237(b) of the Judicial Code, 28 U. S. C., Sec. 344(b).

Garrett v. *Moore McCormack Co.*, 317 U. S. 239; 87 L. Ed. 239.

Broad R. P. Co. v. *South Carolina ex rel. Daniel*, 281 U. S. 537; 74 L. Ed. 1023.

Cheseboro v. *Los Angeles Co. Flood Control Dist.*, 306 U. S. 459; 83 L. Ed. 921.

Hansberry v. *Lee*, 311 U. S. 32; 85 L. Ed. 22.

(d) Aside from other considerations, a question of whether a litigant has been deprived of the fundamental right of due process of law, and in particular the right to

reasonable and adequate notice of hearing in a judicial proceeding, is intrinsically important and substantial.

Milk Wagon Drivers Union v. *Meadow Moor Dairies, Inc.*, 312 U. S. 287; 85 L. Ed. 836.

(6)

The Federal Question Was Raised in the Courts Below

Petitioner raised the Federal question sought to be reviewed herein in the court of first instance (Superior Court) at the commencement of the hearing on respondent's application to set aside the divorce judgment on January 26, 1946 (R. 22, 36). The method of raising the question was by special appearance to contest the jurisdiction of the court to proceed with the hearing or to rule on the application on the ground that the time of the notice was insufficient and unreasonable (R. 22-23, 36, 38-39). The question was again raised by petitioner by an application or motion in the Superior Court to vacate and set aside the order previously made vacating and setting aside the divorce judgment for the purpose of allowing petitioner to present evidence and to be heard on the merits, which application or motion was made to the Superior Court by petitioner and denied on March 5, 1946 (R. 27-29, 35). The basis of petitioner's said application or motion was that petitioner had had no opportunity to be heard on the merits of respondent's application, that petitioner was taken by surprise, and that petitioner's purpose in making said application was to permit her to file affidavits and to be heard on the merits (R. 27-29, 48).

On appeal from said orders of the Superior Court to the District Court of Appeal petitioner, in her opening brief (pages 24-28), reply brief (pages 35-37), and in oral argument, contended that the Superior Court lacked jurisdiction to vacate and set aside the divorce judgment because of in-

sufficiency of notice and that the order vacating and setting aside the divorce judgment violated petitioner's constitutional right to due process and was void. In her petition for rehearing in the District Court of Appeal (pages 2-3), petitioner pointed out to that court that it had in its opinion erroneously held that jurisdiction of the court to make said order, which required adequate notice of hearing, was a matter of discretion. In said petition (pages 6-7), petitioner also pointed out that the District Court of Appeal in its opinion was in error in holding that petitioner's application to vacate the order setting aside the divorce judgment constituted an opportunity for a hearing or a hearing on the merits.

In her petition for hearing in the California Supreme Court, petitioner made but two points: (1) that the Superior Court lacked jurisdiction to make the order setting aside the divorce judgment because of the insufficiency of notice of hearing and absence of due process of law, and (2) that petitioner's motion to set aside the previous order did not confer jurisdiction to make nor did it validate such previous order. The petition was denied without opinion, two justices voting for a hearing.

The opinion of the District Court of Appeal affirming the orders appealed from (R. 69-74; also reported in 81 Advance California Appellate Reports 372) passed upon the federal question of jurisdiction (whether notice was sufficient to constitute due process of law) as follows:

> "The record herein discloses no abuse of discretion in the vacation of the default interlocutory judgment, either in respect to the matter itself, notice and conduct of the hearing, jurisdiction, consideration of the supporting affidavit, or otherwise. No prejudicial error has been shown and the various contentions of appellant are untenable" (R. 73).

Except for the above brief reference to the federal question, the opinion ignored petitioner's contentions in that connection. The opinion purported to dispose of the question of adequacy of notice of the hearing of respondent's application to set aside the divorce judgment with the following reference to the hearing of petitioner's motion for an order vacating the previous order for the purpose of allowing petitioner to be heard on the merits, if and after petitioner's motion were granted, as follows:

> "The same matter, as hereinbefore indicated, was again brought to the trial court's attention by way of the second motion seeking to vacate the first order. At this second hearing, although the wife did not appear in person, the appellant had full opportunity to present, and must be deemed to have presented, all matters which were in any manner pertinent to the issue." (R. 74).

The Question Presented

The only question presented to this court is whether the order vacating and setting aside the divorce judgment was made upon such unreasonable and inadequate notice as to deprive petitioner of her right to a hearing on the merits, namely her right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Reasons Relied On for Allowance of Writ

Petitioner contends that a review of the federal question presented should be granted by certiorari under Rule 38, paragraph 5 (a), Supreme Court Rules, in that the state court has decided a federal question of substance in a way not in accord with and contrary to applicable decisions of this court.

Without doubt one of the fundamental rights under the due process clause of the Fourteenth Amendment, and indeed an inherent right under the principles of our juris-

prudence, is that a litigant is entitled to reasonable notice and the right to be heard before any court deprives him of a property or other right. This court is no doubt well aware of the numerous cases enunciating and applying the principle to various situations. As this court said, in *Roller* v. *Holly*, 176 U. S. 398, 409 (44 L. Ed. 520, 525) in holding that a Texas statute was unconstitutional as applied to the facts therein involved:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose."

In *Anderson National Bank* v. *Luckett*, 391 U. S. 233, at page 246, (88 L. Ed. 692, 705) this court more recently expressed the principle as follows:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

It is settled beyond question in California that a judgment valid on its face cannot be vacated or set aside on application or motion under California Code of Civil Procedure section 473, or otherwise, except on due notice to the adverse party, unless notice be waived, and that a court lacks jurisdiction unless there has been due notice. (*Hicks* v. *Sanders*, 40 Cal. App. (2d) 211, 215; *Gill* v. *Peppin*, 41 Cal. App. 487, 492; *Brownell* v. *Superior Court*, 157 Cal. 703). Said code section was the basis for respondent's application to vacate the divorce judgment herein involved and the authority under which the Superior Court acted (R. 11-12, 36).

As more particularly shown hereinabove in petitioner's jurisdictional statement, petitioner raised the federal question involved in the state courts at every opportunity, but her constitutional right to reasonable notice and opportunity for a hearing on the merits was denied.

Petitioner believes that an extensive argument directed to the point that the notice of hearing involved in this case was so inadequate as to deprive her of due process of law would be inappropriate herein, and therefore she has in this petition attempted merely to present a showing sufficient to establish that a substantial federal question is involved whichrequires a review by certiorari by this court. Before concluding her petition, however, petitioner deems it appropriate to briefly summarize her contention that the notice given was so inadequate and unreasonable as to deprive her of due process of law.

The record, as hereinabove more particularly set forth, indisputably shows that notice of the hearing was served upon petitioner's counsel approximately twenty-four hours before the hearing, that petitioner herself was personally served with notice some time during the day prior to the date of hearing at Earlimart, Tulare County, California, which was approximately 150 miles distant from Los Angeles, the place of hearing of respondent's application for an order setting aside the divorce judgment. Furthermore, the record shows that respondent's affidavit setting forth the alleged facts in support of said application and which constituted the only notice to petitioner of what facts respondent would base his application on was served on petitioner's counsel at 5:05 P. M. on the evening before the morning of said hearing (January 26, 1946 at 10:30 A. M.), that petitioner's counsels' only opportunity to discuss the matter with petitioner before the hearing was briefly by telephone (R. 32), and that approximately one-half of the period of notice included the night of January 13. The

inadequacy of such notice for the protection of the right involved would appear to be obvious. Petitioner was deprived of her "day in court" and to a hearing on the merits, the divorce judgment previously rendered in her favor was set aside, and the order setting aside such judgment should be reversed.

In concluding her petition, petitioner desires to point out that the substantial federal question relied on in seeking review by this court was by its very nature necessarily involved in the judgment of the District Court of Appeal affirming the order of the Superior Court setting aside the divorce judgment. When petitioner's objection to the court's jurisdiction was raised in the Superior Court, that court necessarily had to determine that it had jurisdiction before ruling on respondent's application. Likewise, in affirming said order, the District Court of Appeal necessarily determined that jurisdiction existed even though in its opinion it so briefly touched upon that question. Petitioner's right to due process of law was as effectively over-rid-en as if that court had devoted its entire opinion to consideration of the federal question. Petitioner's right to review of that question by this court should not be measured by the inadequately considered and erroneous view of the state court.

Nor should this court be misled by the language of the opinion of the District Court of Appeal hereinabove adverted to which might tend to lead one unfamiliar with the record to believe that an alternative ground for decision existed, namely the references made in the opinion to the so-called "second hearing" and to the effect that petitioner allegedly "had full opportunity to present, and must be deemed to have presented, all matters which were in any matter pertinent to the issue . . . By stipulation of counsel the record at the first hearing was deemed a part of the record at the second hearing; the matter was argued

in extenso . . ." (R. 74). Such statement is incorrect. The so-called "second hearing" was a hearing only on petitioner's motion to vacate the previous order so that she might thereafter have a hearing on the merits of respondent's application to set aside the divorce judgment, on the ground that petitioner had been deprived of her right to reasonable notice. The only "issue" presented at the so-called "second hearing" was whether the court should vacate the prior order and permit a hearing on the merits because a petitioner had had no reasonable opportunity for such a hearing when the prior order was made (R. 47-68). The record also shows that the stipulation of counsel referred to in the opinion of the District Court of Appeal was only that the reporter's transcript of the hearing on the respondent's application to vacate the divorce judgment be deemed to be part of the record for the purpose of petitioner's motion. Said reporter's transcript contained arguments of counsel only (R. 47, 36-46). There was not, as the language of the opinion implies, any argument during the so-called "second hearing" on the question of whether or not the divorce judgment should have been set aside (R. 47-68). As petitioner's said motion was denied she had no opportunity whatsoever at that "hearing" or any other for any hearing on the merits. In any event, whether petitioner at any time had a reasonable opportunity to be heard on the merits is the federal question presented herein.

An examination of the record hereinabove referred to, will show that the District Court of Appeal was in error in employing such language in its opinion.

An additional reason why no alternative ground for the decision of the District Court of Appeal exists is that if the Superior Court had no jurisdiction to make the order setting aside the divorce judgment, such jurisdiction could not arise by a subsequent occurrence. In *Pennoyer* v. *Neff*, 95 U. S. 714, page 728, (24 L. Ed. 565, 570) likewise a "due

process" case, this court disposed of a contrary contention in these words:

> ". . . the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

Petitioner respectfully submits that this cause is within the jurisdiction of this court and that the substantial federal question presented is one which, in the exercise of sound judicial discretion, should properly be reviewed by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the District Court of Appeal, Second Appellate District, Division One, State of California, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said District Court of Appeal had in the case numbered and entitled on its docket, Civil No. 15738, *Ruth K. Armstrong, Applicant,* v. *Lee R. Armstrong, Respondent,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said District Court of Appeal be reversed by this court, and for such further relief as to this court may appear proper.

Dated December 10, 1947.

HUBERT T. MORROW,
Counsel for Petitioner.

JOHN C. MORROW,
Of Counsel.

APPENDIX

Section 1005, Code of Civil Procedure, State of California:

> "Notice of motion, when to be given. When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every full one hundred miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge or justice thereof, may prescribe a shorter time."

Constitution, State of California, Article VI, Sec. 4, Jurisdiction of Supreme Court:

> ". . . The said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to itself for hearing and decision, as hereinafter provided . . ."

Article VI, Sec. 4(c). Transfer of cases between supreme and appellate courts:

> "The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court . . ."

Rules On Appeal, State of California, Rule 28, Hearing in Supreme Court:

> "(a) [Time within which court may grant hearing] Within 30 days in criminal causes, and 60 days in other causes, after the filing of a decision of the District Court of Appeal, the Supreme Court, on its own

motion, or on petition, may order the cause transferred to itself for hearing and decision."

"(e) [Determination of petition] A hearing in the Supreme Court after decision in the District Court of Appeal, may be granted by an order, signed by at least 4 justices assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect."